IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 236 of 2006
With
CIVIL APPLICATION No. 4667 of 2006
In
APPEAL FROM ORDER No. 236 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GULABSHA SULTANSHA BANVA
Versus
BODUSHA AKBARSHA BANVA AND ANOTHER

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Appearance :
MR HARSHIT S TOLIA for Appellant.
MR ASHISH M DAGLI for Respondents.

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 12/03/2007

ORAL JUDGMENT

The appellant herein had instituted a suit being Civil Suit No.43/2000 before learned Civil Judge (J.D.) at Manavadar against the

present respondents, on the ground that the plaintiff is the sole trustee of religious trust, namely, Limbadshah Pir Dargah, which is a registered public trust bearing registration No.B-418. The plaintiff has filed aforesaid suit for maintaining and managing the trust property. It is the case of the plaintiff that defendants have tried to trespass upon the trust property and that the defendants may be directed to hand over the possession of the trust property to the plaintiff. Said suit was resisted by other side on various grounds. At the time of deciding said suit, learned trial Judge came to the conclusion that the plaintiff has right to file the suit and that the defendants have illegally trespassed upon the suit property and that they have made construction of a permanent nature. Ultimately, the trial Court passed a decree for possession in favour of the plaintiff. Against the aforesaid decree of the trial Court, the respondents herein preferred an appeal being Regular Civil Appeal No.9/2005.

2) By the impugned order, learned appellate Judge partly allowed aforesaid appeal by setting aside the decree of the trial Court and remanded the matter back to the trial Court for reconsideration under Order 41 Rule 23 of the Civil Procedure Code, directing the parties to lead further evidence.

3) Against the aforesaid order, the appellant-original plaintiff has preferred this Appeal from Order.

4) It is submitted by Mr.Tolia, learned advocate for the appellant that the appellate Court should have decided the matter as per the available evidence on record and it was not necessary to give opportunity to lead further evidence. It is also submitted by learned advocate for the appellant that the Appellate Court has power to record additional evidence, if sufficient ground is made out for the same and the appellate

Court has ample powers to call for finding by framing additional issue, if so required.

5) Mr.Dagli, learned advocate for the other side submitted that he has no objection if the order of the appellate Court is set aside by asking the appellate Court to decide the appeal on merits with a permission to to respondent to apply for additional evidence.

6) Learned advocate for the appellant has also submitted that he has no objection if the order of the Appellate Court is set aside and the matter is sent back.

7) Since there is consensus prevailing between the parties, order of the appellate Court is set aside. Regular Civil Appeal No.9/2005 is restored to file of the learned appellate Judge, Junagadh. In case any application is preferred for additional evidence under Order 41 of Civil Procedure Code, the appellate Judge may consider the same on its own merits and if the learned appellate Judge is of the opinion that additional evidence is required to be produced, the same may be taken on record by the appellate Judge and, thereafter, the appellate Court may consider whether any finding is required to be called for on such additional evidence by framing additional issues, as per the powers available under CPC and this Court has not expressed any opinion on this aspect. If any application for additional evidence is preferred by either side, learned appellate Judge may decide the same in accordance with law and pass appropriate order as deem fit.

8) It is pointed out to the Court that at the time when the respondent had filed appeal before the District Court, interim relief was granted staying execution of the decree of the trial Court. Since the matter is sent

back to the appellate Court for fresh decision, interim relief granted earlier in appeal in favour of the respondent shall remain in force till the appeal is decided. Accordingly, decree of the trial Court shall remain stayed till the appellate Court decides the appeal as per the order of this Court.

9) Accordingly, impugned order of the appellate Court is set aside. The appellate Court shall now re-hear the main appeal and decide the same expeditiously. Accordingly, this Appeal from Order is disposed of with no order as to costs. It is clarified that since both the parties have consented for passing aforesaid order, this Court has not gone into the merits of the issue involved in the matter.

10) In view of above order on main appeal, no order on Civil Application No.4667/2006.

(P.B.Majmudar, J.)

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